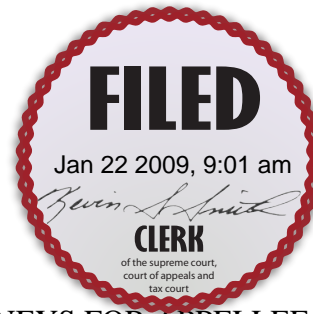


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BENJAMIN F. POMEROY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 46A04-0805-CR-265

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Thomas J. Alevizos, Judge
Cause No. 46C01-0601-FB-21

January 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Benjamin F. Pomeroy challenges the sufficiency of the evidence to sustain his convictions for two counts of class C felony operating a vehicle while intoxicated (“OWI”) causing death. We affirm.

The facts most favorable to the judgment indicate that at about 10:30 p.m. on September 19, 2005, law enforcement officers and emergency medical personnel were summoned to the scene of a one-car accident on Johnson Road in LaPorte County. Emergency responders found Pomeroy’s vehicle almost split in two by a tree. One passenger, Jason Prater, was pronounced dead at the scene. The other passenger, Todd Pratt, was pronounced dead on arrival at the hospital. The driver, Pomeroy, was hanging out of the vehicle. When they extracted him from the vehicle, emergency responders discovered that his right foot was missing and his right leg was severely injured.

Pomeroy was transported to St. Anthony’s Memorial Hospital, where emergency room personnel worked to stabilize him. Due to his level of trauma, emergency room personnel conducted routine blood work, which included a blood alcohol test of his blood serum. The result was .223%. Pomeroy was transferred to Loyola University Hospital for further treatment.

On January 10, 2006, the State charged Pomeroy with four counts of class B felony OWI causing death.¹ Following a bench trial, the trial court found Pomeroy guilty of two counts of class C felony OWI causing death with a blood alcohol content greater than .08%

¹ Counts I and II charged Pomeroy with class B felony OWI causing death with a prior OWI conviction within five years. *See* Ind. Code § 9-30-5-5(a). Pomeroy was acquitted on these counts. Counts III and IV charged Pomeroy with class B felony OWI causing death with a blood alcohol level greater than .15%. *See* Ind. Code § 9-30-5-5(b).

but less than .15%, pursuant to Indiana Code Section 9-30-5-5(a), and sentenced him to two consecutive five-year terms.

On appeal, Pomeroy challenges the sufficiency of evidence to sustain his convictions. When reviewing sufficiency claims, we neither reweigh evidence nor judge witness credibility. *Datzek v. State*, 838 N.E.2d 1149, 1161 (Ind. Ct. App. 2005), *trans. denied* (2006). Rather, we consider only the probative evidence and reasonable inferences supporting the judgment. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We will affirm the conviction if such evidence and inferences could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.*

“To obtain a conviction under Indiana Code Section 9-30-5-1, the State must prove the defendant’s alcohol content in terms of weight of alcohol in the whole blood.” *Datzek*, 838 N.E.2d at 1161. Because his actions resulted in death, Pomeroy was convicted pursuant to Indiana Code Section 9-30-5-5 rather than Section 9-30-5-1. However, the basis for establishing intoxication, the blood alcohol concentration level, is the same under both sections. Therefore, the State must likewise prove the defendant’s alcohol content in terms of the weight of alcohol in the whole blood when seeking a conviction under Indiana Code Section 9-30-5-5.

Here, emergency room personnel conducted a blood alcohol test of Pomeroy’s blood serum. “Blood serum is whole blood with the clotting elements removed.” *Newcomb v. State*, 758 N.E.2d 69, 71 (Ind. Ct. App. 2001) (citation omitted). The alcohol content of whole blood is not the same as the alcohol content of blood serum. *Id.* Therefore, the State

must produce evidence that would allow the factfinder to convert the results of a blood serum alcohol content test to whole blood alcohol content. *Id.* This means that the State must present reliable expert testimony concerning such a conversion. *Datzek*, 838 N.E.2d at 71.

Here, Pomeroy challenges the competency of the State's expert witness, Dr. John Gerometta, to render an opinion on the conversion of his blood serum test result to a whole blood alcohol content. He relies on *Newcomb*, in which we held that the evidence was insufficient to sustain the defendant's conviction under Indiana Code Section 9-30-5-1. 758 N.E.2d at 72. There, the State failed to present testimony establishing that its expert witness, the "technical coordinator" for the hospital's chemistry and blood bank departments, was competent to render an opinion on conversion. *Id.* We note, however, that in *Newcomb*, the technical coordinator testified that her figures were based on "speculations and assumptions." *Id.* (citation and quotation marks omitted). Moreover, she lacked specificity in citing her source and merely testified that blood alcohol content results in serum and whole blood may vary by 15-20%, "according to literature." *Id.* (citation and quotation marks omitted). Finally, in *Newcomb*, the State presented no evidence establishing the technical coordinator's training or credentials. *Id.*

In contrast, here, the State presented evidence that Dr. Gerometta is a medical doctor and pathologist, specializing in clinical and anatomic pathologies. Tr. at 211, 225. As supervisor of the laboratory at St. Anthony's Memorial Hospital, he oversees technicians and other personnel and is responsible for quality control. *Id.* at 225. Although he is not a toxicologist, he displayed a thorough understanding of blood chemistry and alcohol testing.

Id. at 211, 214-18. He testified regarding the variance between blood alcohol content as found in blood serum as opposed to whole blood. *Id.* at 214-18. Moreover, his source for conversion was “*TEETS*,” one of the major textbooks of clinical pathology, and he testified that, applying the conversion factor of 1.14 found therein to Pomeroy’s blood serum result of .22%, Pomeroy’s whole blood alcohol content was approximately .18-.19%. *Id.* at 215-16. To the extent Pomeroy argues that Dr. Gerometta’s testimony was unreliable based on his inability to recall additional studies or sources for measuring blood conversion, these concerns go to the weight and not the admissibility of the testimony.

Finally, Pomeroy asserts that, because some studies apply a conversion factor as high as 1.59, Dr. Gerometta’s use of the 1.14 conversion factor was incorrect. However, Dr. Gerometta testified that 1.14 is the standard conversion factor used in hospitals in northwest Indiana and Illinois. *Id.* at 228-29. Moreover, he testified that if a 1.59 conversion factor were applied, Pomeroy’s blood alcohol level could have been as low as .137%. *Id.* at 223. This percentage fits squarely within the .08% and .15% required under the class C felony version of the crime for which Pomeroy was ultimately convicted. Accordingly, we affirm Pomeroy’s convictions.

Affirmed.

ROBB, J., and BROWN, J., concur.